UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NP SUNSET LLC D/B/A
SUNSET STATION HOTEL CASINO

and **Case No. 28-CA-225263**

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 501, AFL-CIO

RESPONSE TO GENERAL COUNSEL'S MOTION TO TRANSFER AND CONTINUE MATTER BEFORE THE BOARD AND FOR PARTIAL SUMMARY JUDGMENT

Pursuant to National Labor Relations Board ("Board") Rule 102.24(b) and the Notice to Show Cause issued by the Board on September 17, 2018, and within the time called for in the Notice to Show Cause, Respondent NP Sunset LLC d/b/a Sunset Station Hotel Casino ("Sunset Station" or "Employer") hereby responds to the Motion to Transfer and Continue Matter Before the Board and for Partial Summary Judgment ("Motion") filed by the General Counsel for the National Labor Relations Board.

I. INTRODUCTION

Sunset Station admits that it refuses to bargain with the International Union of Operating Engineers Local 501, AFL-CIO ("Union") because the putative bargaining unit consists of "guards" within the meaning of the Act. In certifying the Union, the Region ignored overwhelming and undisputed evidence that the Slot Technicians meet the statutory definition of a "guard" – that is, they enforce the Employer's rules and policies to protect the "property" (*i.e.*, assets) of the Employer. Instead, in direct conflict with the D.C. Circuit's recent decision in *Bellagio, LLC v. NLRB*, 863 F.3d 839 (D.C. Cir. 2017), the Region relied upon the thoroughly discredited notion that only prototypical plant security guards who perform police-like functions are "guards" within the meaning of the Act.

While the Board will typically not re-litigate issues that were raised in the underlying representation case, it will do so in the case of "special circumstances." Here, there is a direct conflict between the Region's decision and the D.C. Circuit's decision in *Bellagio* (as well as decades of prior Board precedent ignored by the Region) on a critical issue of statutory interpretation that would preclude certification of the Union. The Board should take the opportunity to resolve the issue prior to review by the federal appellate courts.

Further, even if the Union were properly certified, its information request seeks information about the social security numbers of bargaining unit employees with no showing as to why such information is relevant or necessary, as well as the Employer's confidential "wage or salary plans." As such, the Motion raises factual issues which preclude summary judgment.

II. FACTUAL BACKGROUND

On June 29, 2018, the Union filed a petition for an election to represent a unit of full-time and regular part-time slot and utility technicians (collectively "Slot Technicians") employed by the Employer at its Henderson, Nevada facility. Sunset Station objected to the election on the basis that the unit comprised guards and could therefore not be represented by the Union (the Union admits non-guards to membership).

During the course of the pre-election hearing, the Employer presented extensive and undisputed evidence that its Slot Technicians enforce the Employer's rules and policies against the Employer's guests, in order to protect the Employer's property and assets. For instance, the Employer presented undisputed evidence that Slot Technicians:

- Maintain, investigate and verify bill validators to protect the Employer against counterfeit currency, counterfeit cash-out tickets, claims that the machine failed to correctly pay or credit a guest, and other attempted theft and fraud that happen on a daily basis. The Technicians are the *only* hourly employees on the Employer's property with technical expertise to fully investigate and verify such issues; hence, the supervisors give great deference to the Technicians' findings and conclusions and are relied upon them on a

near constant basis to detect and investigate potential fraud. (GCX. 8(C) ("Pre-Election Tr.") at 16:9-20, 17:1-8, 18:3-20:2, 22:5-21, 24:16-26:20; *see also* GCX 8(D), Er. Ex. 1 to Pre-Election Hearing.)

- Protect the Employer from fraudulent claims by enforcing the Employer's procedures to verify jackpots with a witness in place and sign jackpot verification sheets before payouts. Indeed, the decision of the Employer on whether to payout a jackpot – anything over $100,000 on the slot machines – *always* follows the investigation and recommendation of the Technicians. (*Id*. at 32:19-34:8; *see also* GCX 8(D), Er. Ex. 2 to Pre-Election Hearing.)

- Protect the Employer from fraudulent claims of game malfunctions, lost credits, or failures to payout winning hands by investigating and verifying guests' claims. The technicians' findings and conclusions are given substantial weight in the supervisors' final decision. (*Id.* at 20:19-21:7, 26:3-20, 27:21-28:8.)

- Review and address reports from manufacturers outlining new vulnerabilities and issues with machine software; individually check machines for vulnerabilities, fix vulnerabilities in games, and report any issues. (*Id*. at 34:25-35:25, 37:6-38:24; *see also* GCX 8(D), Er. Ex. 3 to Pre-Election Hearing.)

- Implement the Employer's policies to ensure that newly-purchased machines are set up correctly in all aspects; failure to properly verify the settings could expose Employer to significant gaming losses. (*Id.* at 41:2-42:4.)

- Monitor, inspect and verify slot machines that have higher-than-expected payout ratios. (*Id.* at 42:21-43:20, 45:10-46:9; *see also* GCX 8(D), Er. Ex. 4 to Pre-Election Hearing.)

- Identify and investigate mistakes or intentional misconduct by other Technicians by reviewing machine data and reporting findings to the supervisor. The Technicians are the *only* hourly employees within the slot department who are prohibited from gambling at the Employer's properties due to their insider information on the performance of specific slot machines; failure to enforce Employer's policies against other Technicians could expose Employer to significant gaming losses. (*Id*. at 48:15-49:9, 49:15-19, 60:7-15, 60:20-61:24, 62:2-13, 62:18-63:5, 77:17-25; *see also* GCX 8(D), Er. Ex. 5 to Pre-Election Hearing.)

- Are entrusted with all types of slot machine access keys, which – if used nefariously – would allow an individual to alter game outcomes and obtain access to the cash within the machine. (*Id.* at 50:8-51:22, 52:22-53:18; *see also* GCX 8(D), Er. Ex. 6 to Pre-Election Hearing; GCX 8(E) at 68:4-14.)

- Enforce the Employer's rules and policies against underage gaming, which protects the Employer against both legal liability and the potential loss of its gaming license. (Pre-Election Tr. at 55:2-7, 55:25-56:16, 57:3-18, 58:10-14.)

- Enforce the Employer's rules and policies against underage drinking by directly checking the guests' photo IDs, or escalating the matter to their supervisor or security as necessary. (*Id.* at 58:15-59:6.)

- Monitor the casino floor for banned or otherwise unauthorized guests or team members and for any suspicious activities to prevent fraudulent or illegal transactions. (*Id.* at 56:6-16, 59:16-21, 60:2-6.)

- Play an integral and indispensable role in assisting the Nevada Gaming Control Board to investigate gaming irregularities and disputes – indeed, without the Technicians, the Nevada Gaming Control Board *cannot* investigate and resolve the disputes and issues. (GCX 8(E) at 69:23-70:6, 71:2-73:8.)

- Play a critical role in assisting the Nevada Gaming Control Board by forming probable cause to effect an arrest when guests are detained for engaging in attempted theft or fraud. (*Id*. at 65:10-14, 73:9-74:6.)

On July 13, the Regional Director for Region 28 overruled the Employer's objections and directed an election. An election was held on July 19, and the Union received a majority of the votes cast. On August 1, the Regional Director certified the Union. Sunset Station filed a request for review on August 13, which was denied by the Board on September 7. Because the Employer is precluded from seeking direct appellate review of the Certification Decision, the Employer does not dispute that it has engaged in a "technical" refusal to bargain with the Union.

On July 27, the Union sent a letter demanding that the Employer recognize and bargain with it, and requesting certain information about the bargaining unit. (Ex. A, at p.3.)[1] Among other things, the information requests the social security numbers of all bargaining unit employees, as well as the Employer's confidential "company wage or salary plans." (*Id.*) That same day, the Employer sent its response declining to provide the requested information because

[1] The Employer notes that the demand was properly limited to bargaining unit employees. (Ex. A, at p.3) The General Counsel's Complaint could be read to suggest that the request applied to all employees of the Employer. The Employer assumes this was inadvertent. To the extent the Complaint could be read to request information about non-bargaining unit employees, such information is not presumptively relevant and the General Counsel has certainly failed to demonstrate why such information is necessary and relevant to the Union's role as collective bargaining representative.

the certification of the Union was erroneous, but noting that it would comply with its legal obligations in the event the certification was ultimately upheld on appeal. (Ex. B.)

On August 9, the Union filed the charge in the instant matter, and the Regional Director subsequently issued a Complaint. On August 16, the Employer filed its Answer, denying the appropriateness of the unit and that the Union is the collective bargaining representative of the unit, and denying that the requested information is relevant and necessary to the Union's performance of its duties as collective bargaining representative. On September 12, the General Counsel filed the instant Motion. The Board issued an Order to Show Cause on September 17.

III. The MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED

A. The Union was Improperly Certified

The Employer acknowledges that it has already raised the propriety of the Union's certification in the underlying representation case. While the Board will generally not re-litigate issues that were or could have been raised in a prior representation proceeding, it will do so where "special circumstances" exist. *E.g. Brinks, Inc. of Florida,* 276 N.L.R.B. 1, 2 (1985). This includes where an Employer raises a "substantial and material" issue that would statutorily preclude the Board from certifying a Union as the exclusive representative of a petitioned-for unit. *Id.* at *2 (ordering hearing where the Employer raised a "substantial and material issue regarding the Union's possible affiliation with an organization that admits nonguards to membership," even though that issue was fully litigated in the underlying proceeding).

Section 9(b) of the Act defines a guard as a person employed to "enforce against employees and other persons ***rules to protect [the] property of the employer*** or to protect the safety of persons on the employer's premises . . . ." *Id.* (emphasis added).

Consistent with the plain language of the statute, the Board had historically held that the definition of "guard" is not limited to notions of a prototypical plant security guard, but includes

employees who more broadly enforce rules against employees or patrons to protect the Employer's property or assets. For instance, in *A.W. Schlesinger Geriatric Ctr., Inc.*, 267 N.L.R.B. 1363 (1983), the Board considered the "guard" status of two maintenance employees who walked the employer's premises and – in addition to their maintenance duties – were authorized to ask that a trespasser or other employee cease creating a disturbance or that the unauthorized person leave. The Board found that, "although the maintenance employees have no special training as guards and do not wear guard uniforms or carry firearms, we conclude that the two night and weekend maintenance employees are employed for security purposes in addition to their maintenance duties." *Id.* at 1364. Significantly, the Board found that the maintenance employees were responsible for keeping unauthorized persons off the premises, even though they had been instructed to contact a supervisor or law enforcement officer first and to avoid confrontation if possible. The Board concluded that it was "sufficient that they possess and exercise responsibility to observe and report infractions, as this is an essential step in the procedure for enforcement of the [employer's] rules." *Id.* Further, the Board found it "not determinative that [these duties were] not their only function." *Id.*; *see also Rhode Island Hosp.*, 313 N.L.R.B. 343, 346-47 (1993) (finding that shuttle van drivers were "guards"; "[A]lthough one of their primary duties is to transport employees from building to building, they are also charged with the responsibility of being on the lookout for and reporting security problems or rules violations."); *MGM Grand Hotel*, 274 NLRB 139, 139-40 (1985) (fire alarm and security system operators fell within statutory definition of "guard" even where sole duties were to observe and report); *Am. Dist. Tel. Co.*, 160 N.L.R.B. 1130, 1136 (1966) ("guard" status is not limited to employees who enforce rules against other employees); *McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324, 326-27 (8th Cir. 1987) (to qualify as a "guard" the performance of guard

duties need not be the employee's only function (collecting cases holding that "unarmed courier service drivers," "fitting room checkers," "armored car guards," and "receptionists, fire patrolmen, chauffeurs and investigators" were "guards" under the Act)).

In *Boeing Co.*, 328 N.L.R.B. 128 (1999), the Board departed from this precedent, holding that "guard responsibilities include [only] those typically associated with traditional police and plant security functions," such as weapons training, wearing "guard-type" uniforms, and having authority to "compel" compliance with the employer's rules. *Id.* at 130. As pointed out by Member Brame in his dissent, the Board's new formulation of the test for "guard" status was inconsistent the plain text of the statute, the Eight Circuit's decision in *McDonnell Aircraft*, and historic Board precedent. *Id.* at 133-34 (Brame, dissenting). Indeed, the case upon which *Boeing* relied for most of its analysis – *Burns Security Servs.*, 300 N.L.R.B. 298 (1990) – had been set aside by the Eighth Circuit in *BPS Guard Services, Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991) before *Boeing* was even issued. Put simply, *Boeing*'s holding that only persons who perform "traditional" police-like functions are guards was poorly reasoned, inconsistent with the plain language of the statute and Board precedent, and has been repeatedly rejected by the federal appellate courts.[2]

Most recently, in *Bellagio, LLC v. NLRB*, 863 F.3d 839, 848-49 (D.C. Cir. 2017), the D.C. Circuit again rejected the Board's narrow definition of "guard" and found – consistent with the Board's historic view – that a casino's surveillance technicians were "guards" under Section 9(b) of the Act. The D.C. Circuit expressly rejected the Board's argument that the technicians could not be guards simply because they "made no rounds," and did not carry out functions akin

[2] The Board has repeatedly overruled precedent when necessary to return to well-established doctrine with a sound basis in the Act. *See, e.g., IBM Corp.*, 341 N.L.R.B. 1288 (2004).

to traditional plant security guards (*i.e.*, they carried no weapons, and did not wear security uniforms or badges). *Id*. at *5. The Court's ruling considered key factors not given due weight by the Board, such as the technicians' duties in deterring, detecting, reporting, and investigating suspicious activity, the modern context in which their enforcement took place, their role in preventing and investigating misconduct by other employees, and their role in protecting the Employer's valuable assets generally. *Id*. at *9. In particular, the Board failed to give due weight to the "peculiar" context of an "ultramodern luxury casino" and the "technological advance[s]" in hotel-casino security. In short, the D.C. Circuit again implicitly rejected the Board's approach in *Boeing* and concluded that, because the surveillance technicians "perform an essential step in the enforcement of rules to protect the casino's property and patrons," they were guards within the meaning of the Act, notwithstanding their lack of "traditional" guard duties. *Id.* at 849.

Here, the Region committed the same errors as the Board in *Bellagio*. First, the Region disregarded the overwhelming and undisputed evidence that a core function of the Slot Technicians' duties is to enforce rules against casino guests and other third-parties to protect the Employer's property and assets. Instead, it focused exclusively on whether the Slot Technicians perform "traditional" security functions – such as physically confronting guests. For example, in overruling the Employer's exceptions, the Region acknowledged that the Slot Technicians play an essential role in protecting the Company against fraud and improper payouts, but held that they merely reported such misconduct rather than confronting guests or other other employees. Similarly, the Region focused on superficial factual distinctions between this case and *Bellagio* and missed the actual point of *Bellagio* – that the statutory definition of "guard" encompasses more than "traditional" police-like security officers. The Region's conclusion that the Slot

Technicians are not "guards" within the meaning of the Act because they do not physically confront or restrain guests is directly contrary to *Bellagio, MGM Grand, Rhode Island Hospital,* and other Board and federal appellate case law, and is plain error.

Likewise, the Region failed to consider the context of an "ultramodern luxury casino." As explained by the Employer's witnesses, with the evolution from mechanical to electronic slot machines, the role of the Slot Technicians is no longer that of a mechanical repairman. Nor is the primary risk to the Employer's assets that a casino patron will physically smash a slot machine and flee with a can full of quarters. Rather, in the modern context, the danger is unscrupulous individuals who try to take advantage of all aspects of the Employer's slot machine operation, ranging from the initial bill validation, to fraudulent payouts and tampering, to claims of lost credits, to fraudulent "EZ-Pay" tickets. *See Bellagio*, 863 F.3d at 842, 850-51. The undisputed evidence is that the Slot Technicians play an essential role in protecting the Employer's property from such fraud and theft.

In sum, because they enforce the Employer's rules against "other persons" to protect the Employer's "property" and assets, the Slot Technicians are "guards" within the plain meaning of the statute, the Board's historical case law, and the D.C. Circuit's recent decision in *Bellagio*.

B. There are Disputed Factual Issues as to the Information Requests

Further, even if the Union were properly certified, summary judgment should be denied because there are disputed factual issues as to the propriety of the information requests. For instance, the Union seeks the social security numbers of bargaining unit employees. There has been no showing that employee social security numbers are necessary to the Union's performance of its duties, and such information is not presumptively relevant. *See, e.g. Maple View Manor, Inc.*, 320 NLRB 1149, 1152 n.2 (1996). Likewise, the requests seek information

about the Employer's confidential "wage or salary plans." It is axiomatic that the balancing test required for the production of such information is fact-intensive inquiry reserved to the trier of fact. *Jacksonville Area Ass'n for Retarded Citizens*, 316 NLRB 338, 340 (1995) ("In making [confidentiality] determinations, the trier of fact must balance the union's need for the information sought against the legitimate and substantial confidentiality interests of the employer.").

Accordingly, while the Employer continues to maintain the Union was improperly certified, there are additional factual issues in this case which preclude summary judgment even if the certification of the Union is ultimately upheld. [3]

CONCLUSION

For the reasons set forth above, the General Counsel's Motion should be denied.[4]

[3] If the Union's certification is upheld, it is possible that the parties and/or General Counsel may negotiate a mutually-agreeable narrowing of the Union's requests, with appropriate confidentiality protections. But both Board and federal law prohibit from the Employer from engaging in such negotiations while it is engaged in a technical refusal to bargain, upon pain of waiving its challenge to the certification. *See, e.g., Technicolor Government Services, Inc. v. NLRB*, 739 F.2d 323, 326-327 (8th Cir. 1984)*; King Radio Corp. v. NLRB*, 398 F.2d 14, 20 (10th Cir. 1968)*; NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1005 (8th Cir. 1965)*; Queen of the Valley Med. Ctr.*, JD-15-18, 2018 WL 1110298 (Feb. 28, 2018) (fact that employer responded to and provided information in response to union's request for information supported that the employer recognized the union, and therefore waived any challenge to certification).

[4] Sunset Station opposes the Union's Joinder and Request for Remedies. Not only are the remedies sought by the Union unwarranted, but they mostly consist of special remedies requiring specific factual support and as such are not appropriate for summary judgment.

Respectfully Submitted,

Date: September 25, 2018

/s/ Harriet Lipkin

Harriet Lipkin
DLA Piper LLP (US)
500 Eighth Street NW
Washington, D.C. 20004
202.799.4250
Harriet.lipkin@dlapiper.com

Kevin Harlow
DLA Piper LLP (US)
401 B Street
Suite 1700
San Diego, CA 92101-4297
619.699.2700
Kevin.Harlow@dlapiper.com

Attorneys for Employer,
NP SUNSET LLC D/B/A
SUNSET STATION HOTEL CASINO

CERTIFICATE OF SERVICE

I hereby certify this 25th day of September, 2018, that a copy of the Response to General Counsel's Motion to Transfer and Continue Matter Before the Board and for Partial Summary Judgment and associated exhibits was electronically served on the Board through the Board's electronic filing system, and served via e-mail on:

Cornele A. Overstreet
National Labor Relations Board
2600 North Central Avenue – Suite 1400
Phoenix, AZ 85004
Cornele.Overstreet@nlrb.gov

David A. Rosenfeld
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
drosenfeld@unioncounsel.net

Elise Oviedo
National Labor Relations Board
Las Vegas Resident Office
Foley Federal Building
300 S. Las Vegas Blvd. Ste. 2-901
Las Vegas, NV 89101
elise.oviedo@nlrb.gov

Jose Soto, Director of Organizing
International Union of Operating
Engineers, Local 501
301 Deauville Street
Las Vegas, NV 89106-3912
jsoto@local501.org

/s/ Kevin Harlow
Kevin Harlow
An Employee of DLA Piper LLP (US)